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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-292

CLAUDE D. BALLEW and ROBERT MITCHUM, d/b/a MOBILE BOOK MART and CINE-MATICS, INC., a Body Corporate of the State of Alabama,
Petitioners,

v.

JAMES A. ROBINSON, in His Capacity as Chief, City of Mobile Police Dept., WILLIAM H. BRIGHAM, in His Capacity as City Attorney for the City of Mobile, JOE A. BAILEY, in His Capacity as Mayor in the City of Mobile, LT. JOE ROMAGNANO, as Officer in Charge of Vice Squad, City of Mobile Police Dept., and in Their Capacity as Members of the Board of Commissioners of the City of Mobile, City Hall: JOE A. BAILEY, LAMBERT C. MIMS and ROBERT B. DOYLE, JR.,
Respondents.

On Appeal from the United States Court of Appeals
for the Fifth Circuit

MOTION TO DISMISS

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MOTION TO DISMISS

Respondents move this Court to dismiss the petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the ground that the granting of the Writ is not within the jurisdiction of this Court, because not taken in conformity to the rules of this Court; and, the relief sought, being that of federal court intervention by injunctive or declaratory action concerning pending State actions, is not supported by a showing in the record of great and immediate irreparable injury, combined with bad faith harassment, and is not absent counterbalancing equities in favor of the Respondents herein.

ARGUMENT

Apparently Petitioners in this cause have intentionally failed to comply with the first requisite of a Jurisdictional Statement under the Rules of this Court, Rule 15, Revised Rules of the Supreme Court of the United States, 1(a). Rule 15, subparagraph 1(a), requires that subparagraph (h) be complied with, by appending to the Jurisdictional Statement the Findings of Fact and Conclusions of Law of the District Court made after hearing in this cause.

By so failing to enlighten this Court with the facts, which were proven at hearing, the Petitioners are attempting to involve the Court in the fictional world first foisted on the City of Mobile, Alabama, and then upon the United States District Court for the Southern District of Alabama, and then upon the United States Court of Appeals for the Fifth Circuit. Taken as truth, the Petitioners' fictions are arresting; but no more arresting than the facts actually proven show the attempted deceit of the Petitioners to be.

The Findings of Fact and Conclusions of Law of the District Court are attached hereto as Appendix "A," since Petitioners did not see fit so to do.

Excerpted here are portions of said Findings and Conclusions, to show the diametrically opposing positions of the facts as proven, and the allegations and misstatements of the Petitioners herein in their "Opinions Below" (p. 2), "Statement of the Case" (p. 4-8), and "Conclusion" (p. 48), of their Petition for Writ of Certiorari.

U. S. District Court for the Southern
District of Alabama

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Number and Title Omitted. Filed Oct. 16, 1970)

Introduction

The evidence upon hearing for preliminary injunction in this cause showed the following to be the facts concerning the business and those responsible for the business at 12 South Conception Street, Mobile, Alabama, during the months of October and November, 1969, and from April, 1970 to the date of the hearing, May 22, 1970.

In early October, 1969, a bookstore was owned, opened and licensed by Robert Mitchum, apparently a non-resident of Alabama, and not a party to this action as filed or at the time of the hearing. Vending machines were moved into the store and applications were made for a license for the vending machines by various interests from out of the state of Alabama, the interests refusing to reveal their identity when making such applications. Licenses, alleged in the complaint to have been applied for by Cine-Matics, Inc., a body corporate of the State of Alabama, could not have been issued lawfully as there was no such corporation, nor was there any of the same name qualified to do business in Alabama to whom licenses could have been issued. The vending machines were put into operation without licenses having been obtained, by any agent of the out-of-state interests, which after a hearing, resulted in the license for the bookstore of Robert Mitchum being revoked by the City of Mobile.

During the November operating time purchases were made by the City of the materials in the store of Robert

Mitchum which subsequently led to a single arrest of one of Robert Mitchum's employees on a charge of selling obscene material and to an injunction suit for operating a business of selling obscene materials. The latter action was against the actual owner of the store, viz., Robert Mitchum (not a party to this action as that is at the time of the hearing).

From these facts, essentially, this litigation arose. It was brought in the name of the one employee of Robert Mitchum, who was arrested. Charlie Ballew sues in the name of a corporation which did not exist at the time of any of the occurrences alleged in the complaint concerning the corporation; nor was there a corporation in the same name as petitioner doing business in a manner which could effectively, and lawfully transfer any rights to a subsequent corporation styled as is the corporate petitioner in this action.

Ballew seeks relief from the one charge of selling obscene material and the one arrest for operating vending machines without a license therefor. The latter charge is alleged, by the complainants under oath, to have arisen due to the City wrongfully having refused to issue licenses (to a non-existent corporate owner [illegible] Inc. which did not exist and which offered no proof of the manner in which it could have acquired any of the rights claimed to belong to it as alleged in the complaint, seek relief from the actions taken by the City which were based upon the vending machines being admittedly operated without licenses.

By reason of facts found and the legal conclusions reached, all as hereinafter set forth, I am of the opinion that a decree should be entered denying the preliminary injunctive relief sought by petitioners and finding that the City ordinances and licensing procedures and state laws attacked as unconstitutional or unconstitutionally

applied are neither. In connection with the foregoing, I enter the following findings of fact and arrive at the following conclusions of law:

1

On October 8, 1969, a bookstore at 12 South Conception Street, Mobile, Alabama, was opened by, stocked by, licensed with business license to and supplied with employees by Robert Mitchum, reputedly of Atlanta, Georgia. The City of Mobile issued a license to Robert Mitchum as the owner of the store. Paragraphs (2) through (6), below, set out involvements concerning licenses for vending machines and the bookstore which the evidence shows in no manner, ultimately, involved the issue of obscenity.

2

During October, 1969, an application for licenses for vending machines was made to the Revenue Department of the City of Mobile and referred to the Police Department, the licenses to be for "Robert Mitchum", of Atlanta, Georgia. The undisputed testimony is that the agents of Robert Mitchum refused to give information sufficient to allow an investigation into the identity and possible criminal record of the purported owner at that time, Robert Mitchum. During this time, the City was without knowledge of the true nature of the vending machines, and consequently did not issue licenses for what could have been gambling machines or some game of chance, as far as is shown by any evidence before me at this time. The bookstore operated during the month of October with no further inter-action of the City or the owner-licensee, Robert Mitchum.

3

During the first week of November, 1969, Robert Mitchum, the store owner and licensee, had, or allowed, vending machines moved into the bookstore purportedly

to show movies. The Legal Department of the City of Mobile was advised at this time by the Police Department of the refusal of Robert Mitchum as the owner of the store, and as the intended licensee for the vending machines, to divulge information sufficient to allow an investigation of his background and possible criminal record. Shortly thereafter the Revenue Department of the City of Mobile received a letter from Joe Fine, Attorney of Russellville, Alabama, for "Cine-Matics, Inc.", to which letter was attached a check offered in payment of licenses for the vending machines "owned" by "Cine-Matics, Inc."

"Cine-Matics, Inc.," an Alabama body corporate, petitioner here, was not in existence during or prior to November, 1969. However, the City was not aware that such was the case, nor was the City aware that no corporation, "Cine-Matics, Inc.," or any of very similar name, whether an Alabama or foreign corporation, was qualified to do business in Alabama during or prior to November, 1969.

4

On or about November 10, 1969, the Legal Department was visited by Attorney Fine, who was in Mobile seeking to have licenses issued for the vending machines which purportedly showed movies, in the name of a corporation styled "Cine-Matics, Inc." The City Attorney, William H. Brigham, advised that the City must know who was to be held responsible for the operation of vending machines for which licenses were sought, and therefore investigation forms would be forwarded to Attorney Fine with an accompanying letter explaining the information desired by the City. The forms were sent, with letter, on November 13, 1969. **There is no doubt that the forms were never returned, the true owner, whomever he or it may be, thereby refusing to divulge the information rea-**

sonably necessary for the welfare of the citizens of the City, State and the "other 49 states". (Emphasis added.)

On approximately November 14, 1969, the true owner of the vending machines having refused to divulge information concerning any corporation qualified to do business in Alabama or a suitable individual to whom licenses could be issued for the vending machines, commenced operating the vending machines without licenses. It is here noted that the complaint admits that petitioner Ballew operated the vending machines, on advice of counsel, without licenses for the vending machines. The proof is undisputed that there was no corporation to whom licenses could have lawfully been issued as none was qualified to do business with a name as alleged for the corporate petitioner. The same "counsel" who advised Ballew to operate the vending machines without licenses was aware of this state of facts.

5

On November 18, 1969, the City of Mobile License Code was amended to make definite the amount required for vending machines which showed movies, an annual rate being established therefor. The proof at the hearing showed that the annual license rate was considerably below some rates presently being collected by the City according to the undisputed evidence.

Also on November 18, 1969, an employee of the store, Claude Ballew, as agent of the owner of the vending machines who would not divulge sufficient information to allow determination of a police record, or as agent of a corporation (which, unknown to the City, was not qualified to do business in Alabama), was served notice that the licenses for the vending machines should be paid by whomever was responsible for the vending machines being operated without licenses in the bookstore licensed to Robert Mitchum.

On November 20, 1969, the License Department Investigator, Seale, determined that the vending machines were still being operated without licenses and therefore obtained a warrant for the arrest of Claude Ballew, as the agent of the owner of the bookstore and the owner of the vending machines who allowed the machines to be operated without a license. Claude Ballew was arrested on this charge.

On November 20, 1969, a civil suit was filed against Cine-Matics, Inc., as the owner, or whatever entity was the owner, of the vending machines being operated without licenses, for the money owed on the licenses. As the owner was unknown and apparently a non-resident of the State of Alabama, the only property in Alabama known to be owned by the true owner, the vending machines, was attached to satisfy whatever judgment might be forthcoming under this civil action for money owed. The owner of the vending machines has, as far as any evidence presented shows, refused to demand the return of the machines, and has also **voluntarily** chosen not to obtain possession by following procedures allowed by law in attachment suits. Title 7, Section 876, Code of Alabama.

6

On November 25, 1969, at the next City Board of Commissioner's meeting, the bookstore license was conditionally revoked due to the owner of the bookstore, Robert Mitchum, operating or allowing the operation of unlicensed vending machines in his store, after notice, and contrary to the law of the State of Alabama, as well as the City of Mobile. Title 37, Section 754, Code of Alabama. Notice of a hearing to show cause why the conditional revocation should not be made final was served on the agent of the licensee of the store and on the attorneys for the same, the hearing to be held two weeks subsequent to the conditional revocation.

On December 9, 1969, the hearing on the show cause procedure under the license code of the City of Mobile was held at the regular meeting of the Board of Commissioners. Robert Mitchum was represented by counsel John Coleman of the Mobile bar. The only testimony given at the hearing by any party, which was uncontradicted and which was not denied, was that after notice of license being required and due, the vending machines were operated at the bookstore of Robert Mitchum and were not licensed at the time.

At the time of this "show cause" hearing there had been no conviction on the basis of a violation of the City of Mobile's obscenity ordinance. Apparently as a consequence of this situation, there was no testimony, whatsoever, given at the license revocation hearing concerning any violation of the obscenity ordinance upon which a license revocation could be founded.

Consequently, on the basis, and only on the basis, that the bookstore was operated in contravention of the laws of the State of Alabama and the City of Mobile by operating vending machines without licenses, the revocation of the bookstore license of Robert Mitchum was made final by the Board of Commissioners on December 9, 1969.

On May 18, 1970, a civil action in State Court for money owed by Robert Mitchum or the true owner if other than Robert Mitchum, as actual owner of the vending machines for which license fees were due, was filed. This action was filed after the City became fully aware that there was no corporation qualified to do business in Alabama, domestic or foreign, with a styling similar to "Cine-Matics, Inc.", at the time when the vending machines had been operated previously, and at the time when the previous civil action brought against "Cine-Matics, Inc." had been filed. Attachment in aid of suit against Robert Mitchum was made on the materials in the store, since this was the

only property known as supposed to be owned by non-resident Robert Mitchum. This was done in order that the judgment against this non-resident might be satisfied, if and when obtained. There was no proof that Robert Mitchum thereafter sought the return to his possession of these materials by the process of law provided him, or the true owner if other than him. Title 7, Section 876, Code of Alabama.

7

The facts concerning the operation of Robert Mitchum's store in violation of the obscenity ordinance of the City of Mobile as shown at the hearing for preliminary injunction were as follows:

On November 17, 1969, representatives of the City of Mobile bought samples of the various merchandise sold in the store of Robert Mitchum including newspapers, magazines, books and movie film. On November 20, 1969, officers of the Mobile Police Department bought one book from employee Claude Ballew, which book was taken by the officers to the Judge of the City Municipal Court. The Judge examined the book completely and then signed a warrant for the arrest of Claude Ballew for selling the book in violation of the obscenity ordinance of the City of Mobile.

On November 20, 1969, suit was filed by the City seeking an injunction against the operation of the bookstore of Robert Mitchum in violation of the obscenity ordinance of the City of Mobile, the defendants in the injunction suit being served and notice given to the Attorneys for the defendants, John Coleman and Robert Smith. On November 21, 1969 a motion for instanter relief in the injunction action was filed by the City of Mobile and on the basis of affidavits submitted to the Court by citizens of the City of Mobile including the President of Downtown Mobile Un-

limited and the Executive Secretary of Downtown Mobile Unlimited, the injunction was issued on this date. The defendants totally failed to appear, file an answer, or request for hearing or any other pleading at any time whatsoever in this case. Consequently a decree pro confesso was entered more than five months later by the State Court (Judge McRae).

On December 12, 1969, Claude Ballew, the employee of Robert Mitchum at the bookstore, was convicted in the Mobile Municipal Court on a single charge of selling a book in violation of the obscenity ordinance, and one charge of operating vending machines without licenses therefor. These cases were appealed to the Circuit Court of Mobile County, State of Alabama, by defendant and are pending therein.

As against the complaint allegations that petitioners are being crushed by delayed vindication of their First Amendment rights, it has not been disputed that plaintiffs have acquiesced for months and months in the postponement of the pending state criminal proceedings. They have neglected during all this time to press for their right to speedy state adjudications or even to press to raise in the state courts the issues of constitutional law they want this court to decide.

Conclusions of Law

8

It was conclusively proven that the Alabama corporation named as one of the petitioners in this proceeding did not even exist at the time the matters alleged in the complaint were alleged to have in fact occurred to, and been the concern of, this "corporate" petitioner and from which it allegedly suffered multitudinous constitutional oppressions. Therefore, the Alabama corporation has no standing

to complain of the matters alleged. There was no proof of the existence of a foreign corporation by the name of Cine-Matics, Inc. But even if there were such a foreign corporation, such foreign corporation was not entitled to do business in the State of Alabama of the nature alleged in the complaint as it was conclusively proven that no such foreign corporation had ever qualified to do business in Alabama. Therefore, no foreign corporation, if it exists, could have been lawfully issued licenses by the City of Mobile. Any business done by a foreign corporation in Mobile of the nature alleged in the complaint was illegal and violated state law. **Code of Alabama,** Title 10, Section 21(89) et seq.; **Constitution of Alabama,** Article 12, Section 232. Any business done by agents or employees of Cine-Matics, Inc. was a violation of State law. Therefore, the corporate petitioner cannot be the real party in interest, if there is such, entitled to relief of some nature in this action, for all the wrongs allegedly done to this corporate petitioner. (See Paragraph 20, infra.)

Robert Mitchum was not a party to this action when filed or upon hearing. He is, apparently, the real party in interest so far as the business and license of "Mobile Book Mart" are concerned. Claude Ballew is not the real party in interest as to these matters, he being merely an employee of Robert Mitchum. Rule 17 (a) of the Federal Rules of Civil Procedure provides that "every action shall be prosecuted in the name of the real party in interest . . .".

Robert Mitchum, on hearing was shown to be the prime instigator of the complaint in this case. The complaint claims wrongs to a non-existent corporation and wrongs to the license and business interests alleged in the complaint to belong to one shown by the evidence to be a mere employee. Mitchum, by counsel, after the evidence showed his design, sought to amend under Rule 17 (a) and become

a party thereunder as the real party in interest. Transcript p. 89. This Court granted the motion to amend in five days, as sought by Mitchum. Mitchum, following his pattern, filed an amendment weeks later based on Rule 19. He alleged that this Court had allowed him do so.

It is difficult to find that Robert Mitchum comes into this Court with clean hands.

9

Claude Ballew is a real party in interest and does have standing to complain concerning the two arrests made against him. However, these matters are now pending on appeal for trial in the State Court and would appear to be classic examples of those state actions which are prohibited from being enjoined because of the provisions of United States Code, Title 28, Section 2283; vix, the facts of these cases are not within an exception of this injunction statute.

As pointed out above, Cine-Matics, Inc., had no licenses for the operating of the vending machines alleged in the complaint to belong to the corporation, and could not have validly acquired or held licenses. Any act done by Ballew in furtherance of the illegal activities of Cine-Matics, Inc., i. e. operating the vending machines allegedly owned by "Cine-Matics, Inc., an Alabama body corporate" was also illegal. No other person or entity bought the licenses. The arrest for operating the machines without licenses must stand.

* * * * * * *

See Appendix "A" for full "Conclusions of Law."

From the quoted portion of the District Court Findings of Fact and Conclusions of Law it is evident that the actions of the Respondents complained of by Petitioners arose under separate courses of action followed by Petitioners. Primarily petitioners entered into a

fraudulent design or scheme to acquire licenses for vending machines without identifying the entity (actually, nonentity) or person (possibly, criminal) who would be responsible. The evasion of the statute (Code of Alabama, Title 37, Sec 715) requiring the governing body of the cities to know who is being licensed brought on multiple easily foreseen consequences, under other statutes, but which petitioners hope to evade in one fell swoop in the Federal Court System by claiming unconstitutionality of the evaded statute.

Secondarily, two actions were brought by respondents on the basis of petitioners selling obscene material, i.e., one arrest, and an injunction suit to abate a nuisance. These are clearly not due consideration in Federal Courts at this state due to 28 USC 2283 and recent U. S. Supreme Court holdings. **Younger v. Harris,** 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746, Samuels v. Mackell, 401 U.S. 66, 27 L. Ed. 2d 688, 91 S. Ct. 764, Dyson v. Stein, ... U.S. ..., 27 L. Ed 2d 701, 91 S. Ct. ..., Byrne v. Karalexis, ... U.S. ..., 27 L. Ed. 2d 792, 91 S. Ct. ..., Boyle v. Landry, 401 U.S. 77, 27 L. Ed. 2d 696, 91 S. Ct. 758, Perez v. Ledesma, ... U.S. ..., 27 L. Ed. 2d 701, 91 S. Ct. ..., (All 1971); Atlantic Coast Line v. the Brotherhood, 398 U.S. 281, 90 S. Ct. 1798, 26 L. Ed. 2d 234 (June, 1970).

Petitioners' "Reasons for Granting the Writ" can most advantageously be answered in reverse order since such a review of the facts of the case and applicable law will show most clearly that under applicable holdings of this Court, there is no plausible grounds to grant the Writ.

Respondents have not been notified that any portion of the record in this cause has been requested to be certified by Petitioners, as required by Rule 12, Supreme Court Rules. On Page 47 of Petitioners' brief herein is found a citation to (T.183), which is a citation to the

Appendix filed by Petitioners to the Fifth Circuit Court of Appeals. Respondents' citations hereinafter will be to said Appendix.

I (III)

Petitioners contend:

> **"The Licensing Ordinance in Question as It Purports to Regulate the Commercial Exercise to First Amendment Freedoms Is Unconstitutional."**

Respondents contend

> **A Claim of Unconstitutionality Will Not Be Heard to Excuse the Consequences of a Voluntary, Deliberate and Calculated Course of Fraud and Deceit by One Who Elects Such a Course as a Means of Self Help, and Attempts to Escape the Consequences by Urging That His Conduct Be Excused Because the Statute Which He Sought to Evade Is Unconstitutional, But Which Evaded Statute Is Not the Statute From the Consequences of Which He Seeks to Be Relieved.**

While peaceably operating a bookstore, and applying for vending machine licenses, petitioners SOUGHT TO EVADE the application of Code of Alabama, Title 37, Section 751, by the City of Mobile:

> "Theatres, tenpins, shooting galleries, etc. Any city or town shall have the power to license, tax, regulate, restrain, or prohibit theatrical and other amusements, billiard and pool tables, nine or tenpin alleys, box or ball alleys, shooting galleries, theatres, parks and other places of amusement when in the opinion of the council the public good or safety demands it, to refuse to license any or all such business and to authorize the mayor by proclamation to cause any or all houses or places of amusement, or houses

or places for the sale of firearms or other deadly weapons, to be closed for a period of not longer than the next meeting of the city or town council." Title 37, Section 751.

Under the statute, cities in Alabama are responsible for those parties offering entertainment as well as the type of entertainment allowed in the respective cities. It is the duty of the council or City Commission as the case may be, to investigate and determine if the entertainment, or those who may masquerade under the guise of offering some stated type, to be offered may be such as will be harmful to the public health, safety or welfare.

Since "vending" machines are often connected with gambling devices or games of chance, the Revenue Department of the City of Mobile, with the aid of the Police Department when investigating one of over 1,000 out-of-state, follows a standard procedure in each and every application for vending machine licenses of requesting sufficient information to identify the party or entity to be responsible for the machines.

In this action, if those allegations of the complaint (and tracted in the brief) (Appx. p. 13-16. Pet. brief p. 5) to the effect that all information sought by the City was furnished by the petitioners as to the parties responsible for the operation of the vending machines, there would be an entirely different status to this action—an abatement of a nuisance action, and a single arrest for selling obscene literature would be the sole issue.

As set out in the statement of facts, the letter of the City Attorney with forms, concerning Tim-Mahon, Inc. (Appx. pp. 121-124), sent to petitioner's Attorney Joe Fine was never answered. IT COULD NOT BE. There was no such corporation in November 1962, qualified to provide the answers requested. And as to [illegible] the

record, and especially not in the evidence put on at the hearing, is the identity (by birthdate) of "Robert Mitchum" as the first proposed licensee of the vending machines shown to have been given to the City.

Since petitioners could not, or would not, provide the full details concerning vending machine prospective licensees, the petitioners decided to evade the City's Sec. 751 inquiries, operate vending machines without obtaining licenses, brazen out the consequences, and rely on condemning as unconstitutional the law (Sec. 751), although the consequences to be suffered would be from the application of unrelated statutes and ordinances brought into play only due to the original evasion of Section 751, Title 37.

The consequences risked by operating the vending machines without licenses were not difficult to foresee:

1. Money for the operating of the machines would be due from someone; with attendant attachment possibilities to cover a judgment (especially true when dealing with out-of-state unidentifiable owners).

2. Operating a business function without a license is validly subject to a criminal action.

3. Performing a criminal business function (as in (2)) in the process of operating an otherwise validly licensed and operating business, would subject the validly obtained business license to revocation possibilities under Sec. 30 of the City License Code (Appx. p. 273).

Each of the possible consequences occurred to Petitioners. Can one or any of the petitioners be heard to claim relief based on the unconstitutionality of the statute (Title 37, Section 751) evaded deliberately and fraudulently, although the damages they claim to have suffered

are not from a prosecution or application of Title 37, Section 751, Code of Alabama?

The U. S. Supreme Court has ruled as to such a claim for relief based on unconstitutionality of the evaded statute, which is not the statute or statutes under which conseqences are suffered that the defrauder seeks to escape. The Court stated the law to be:

> "The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioner's (consequences of) fraud. It is not an action to enforce the statute claimed to be unconstitutional" (Parenthesis added). **Bryson v. United States,** 396 US 64, 24 L. Ed. 2d 264, 90 S.Ct. 355 (1968).

Bryson v. United States is a criminal action. The convicted criminal was not allowed to attempt to rely on the unconstitutionality of a fraudulently evaded statute as grounds to excuse action for the consequences of the fraudulent evasion. We, in the instant case, are not dealing entirely with criminals, or criminal actions. But for any non-criminals, and for the non-criminal actions sought to be set aside, equitable principles are clearly to be considered before relief can be allowed in the lower Federal Court system. **Younger v. Harris,** 39 L.W. 4201; **Samuels v. Mackell,** 39 L.W. 4211. Certainly the governing principle disallowing a claim of unconstitutionality to be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit with unhappy consequences, if it applies to a man in jail, must apply to a party seeking the aid of equity, where the party has bottomed his actions on deceit.

In the instant action, petitioners attempted to deceive the City into issuing vending machine licenses to a non-existent corporation. When asked by the City for relevant information of the corporation before licenses would be issued, under § 751, Title 37, petitioners claimed "counsel" advised:

> ". . . a person faced with such an unconstitutional licensing law may ignore it, and engage with impunity in the exercise of the right of free expression for which the law purports to require a license" (**Shuttlesworth v. City of Birmingham**, 89 S.Ct. 935) (Appx. p. 16).

The whole scheme is a sham—at no place in the record is there evidence of an attorney who would so advise petitioners UNDER THE FACTS OF THIS CASE. And the petitioners suffered the consequences.

But this court, sitting in equity, clearly will not relieve petitioners of the burdens of the consequences. **Bryson v. United States**, *supra.*

> ". . . it cannot be thought as a general rule of our law a citizen has a privilege to answer fraudulently a question (even if) the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and wilfully answer with a falsehood." **Bryson v. U. S.**, *supra*, 24 L. Ed. 2d at 271 (parenthesis added).

II

Petitioners Seeking Federal Court Intervention by Injunctive or Declaratory Relief of Pending State Procedures Must Show Great and Immediate Irreparable Injury, Combined With Bad Faith Harrassment, With No Counterbalancing Equities, Before the Federal District Court Should Assume Jurisdiction.

Following the hearing in the District Court in this cause in May of 1970, there have been announced two basic clarifications of the proper relationship between:

a) proceedings in state functions and courts; and

b) the supposed necessary assumption by the Federal court system of jurisdiction for injunctive and declaratory relief of claimed unconstitutional state statutes, or unconstitutional state actions under state statutes.

First in time was **Atlantic Coastline v. Brotherhood of Locomotive Engineers**, 398 U.S. 281, 90 S.Ct. 1789, 26 L.Ed. 2d 234 (June, 1970). This decision interpreted 28 U.S.C., 2283, the anti-injunction statute as applied to state court injunctive proceedings.

On February 23, 1971, the U. S. Supreme Court delivered opinions of **Younger v. Harris**, supra, **Samuels v. Mackell**, supra, **Dyson v. Stein**, supra, **Bryne v. Karalexis**, supra, and **Boyle v. Landry**, supra. These opinions covered "Our Federalism" and it might be surmised, seem to relieve the lower Federal Court system of the heavy burden assumed on the basis of **Dombrowski v. Pfister**, 380 U.S. 479 (1965), concerning state proceedings or statutes claimed unconstitutional.

Without presuming on the Court's time by quoting at length from and attempting to interpret this Court's February 23, 1971 holdings, the basic holdings may be:

1. Federal Courts should not grant injunctive relief against State proceedings claimed unconstitutional unless GREAT AND IMMEDIATE irreparable injury is evident from the showing made by petitioners. Younger v. Harris, *supra;* Perez v. Ledesma, *supra.*

2. Declaratory relief, which is often nearly impossible to separate in effect from injunctive relief, similarly should not be granted as to state proceedings claimed unconstitutional unless Great and Immediate irreparable injury is evidence from the showing made by Petitioners. Samuel v. Mackell, *supra;* Perez v. Ledesma, *supra;* Younger v. Harris, *supra.*

Relating these tests, which seem to be combined with a need to show bad faith, and harrassment on the part of the state, Younger v. Harris, *supra,* to the facts in the instant record seems to uphold the District Court's denial of relief.

As to Great and Immediate irreparable damages, the Petitioners firstly could have avoided all the licensing involvements by either furnishing the requested information as to prospective vending machine licensees, and paying the license; or alternatively, filed a Bill for Declaratory Judgment in the State Court, seeking a temporary restraining order on the actions of the City concerning requests for information or setting of claimed high license fees; or, paid under protest and in conjunction with filing a Bill for Declaratory Judgment; or, not operated the vending machines until state recourse had been sought in court, and denied. None of these were done.

But instead, petitioners seemed to be the parties exhibiting bad faith, by fraudulently acting as shown by the record, and hoping to have Federal Court relief from the consequences of their attempted deceit.

The numerous consequences of petitioners' apparent "poor advice of counsel" cannot now be termed harrass-

ment, since petitioners could foresee the consequential results of their fictitious corporate offering to acquire the licenses followed by operating the machines without licenses.

Most convincing of all, however, is the REOPENING **of the bookstore immediately after filing of the federal action, with no city bookstore license; no reply or appearance in the abatement of a nuisance action, and under a writ of injunction completely ignored; and no attempt to vindicate in either criminal action in the state courts all of the claimed constitutional oppressions** (Appx. pp. 145, 146, 242). Certainly petitioners could see NO Great and Immediate irreparable injury threatened by whatever actions the City had taken or that the petitioners could see the City could take in the future, judging by the petitioners' actions in reopening.

> "Moreover, the existence of a 'chilling effect', even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. **Schneider v. State,** 308 U. S. 147 (1939); **Cantwell v. Connecticut,** 310 U.S. 296 (1940); **Mine Workers v. Illinois Bar Assn.,** 389 U.S. 217 (1967). Just as the incidental 'chilling effect' of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important

and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution.''

Younger v. Harris, 39 LW 4201, at 4205 (1971).

Inasmuch as the petitioners would be facing no more than a Bill to Abate a Nuisance, and a single arrest for selling obscene material, if they had not chosen to supply reasonable information on the prospective licensees (other than a non-entity), and refused to pay the license on vending machines under protest, or some alternative as set out, supra, it is relevant to set out one further quote of the February 23, Supreme Court holdings, dealing with Federal court declaratory action against alleged unconstitutional state taxing statutes and procedures.

As in the instant case,

''. . . the lower courts had dismissed the complaint on the ground that the challenged law was constitutional. This Court affirmed the dismissal, 'but solely on the ground that, in the appropriate exercise of the court's discretion, **relief by way of declaratory judgment should have been denied without consideration of the merits.**' Id., at 301-302. The Court, in a unanimous opinion written by Mr. Chief Justice Stone, noted first that under long-settled principles of equity, the federal courts could not have enjoined the Louisiana official from collecting the state tax at issue there unless, as was not true in that case, there was no adequate remedy available in the courts of the State. This judicial doctrine had been approved by Congress in the then recent Tax Injunction Act of 1937, 50 Stat. 738, now U.S.C., § 1341. Although the declaratory judgment sought by the plaintiffs was a statutory remedy rather than a traditional form of equitable relief, the Court made clear that a suit for declaratory

judgment was nevertheless 'essentially an equitable cause of action,' and was 'analogous to the equity jurisdiction in suits quia timet or for a decree quieting title.' 319 U.S., at 300. In addition, the legislative history of the Federal Declaratory Judgment Act of 1934, 48 Stat. 955, as amended, 28 U.S.C., § 2201, showed that Congress had explicitly contemplated that the courts would decide to grant or withhold declaratory relief on the basis of traditional equitable principles. Accordingly the Court held that in an action for a declaratory judgment, 'the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds.' 319 U.S., at 300. The Court's application of these principles to the specific problem of declaratory judgments relating to the correction of state taxes is worth quoting in full, because it bears so directly on the problem before us in the present case:

> "The earlier refusal of federal courts of equity to interfere with the collection of state taxes unless the threatened injury to the taxpayer is one for which the state courts afford no adequate remedy, and the confirmation of that practice by Congress, have an important bearing upon the appropriate use of the declaratory judgment procedure by the federal courts as a means of adjudicating the validity of state taxes.
>
> "It is true that the Act of Congress speaks only of suits 'to enjoin, suspend, or restrain the assessment, levy or collection of any tax' imposed by state law, and that the declaratory judgment procedure may be, and in this case was, used only to procure a determination of the rights of the parties, without an injunction or other coercive relief. It is also true that the procedure may in every practical sense operate to suspend collec-

> tion of the state taxes until the litigation is ended. But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion **that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes,** *save in exceptional cases,* **require a like restraint in the use of the declaratory judgment procedure.**" 319 U.S., at 299. Samuels v. Mackell, 39 LW 4211. (Emphasis added.)

Under the above quoted law, certainly the instant case is not an "*exceptional case*", in petitioner's favor, at least. The District Court therefore was correct in denying all relief sought in regard to those several state (city) proceedings which were the consequences of the fraudulent attempt by Petitioners to have licenses issued to a fictitious (or at best unqualified and unlicensable) corporation, and the subsequent operation of vending machines supposedly based on "advice of counsel" that the licensing law (Title 37, Sec. 751) which allowed a refusal under such facts is "unconstitutional", i.e., those state court actions of suit for money owed for the licenses required for the operating vending machines, with resulting attachment of vending machines since no in-state entity was available to answer for the judgment; the single arrest for operating the machines without a license; and, the revocation of the book store license on the sole ground of operating the vending machines without licenses in the bookstore.

Therefore, the District Court did not err in denying all relief, although conceivable the lower court should merely have granted the motion to dismiss, under the February 23, 1971 cases.

III

Any Injunction Against State Court Proceedings Otherwise Proper Under General Equitable Principles Must Be Based on One of the Specific Statutory Exceptions to S 2283 if It Is to Be Upheld. Moreover Since the Statutory Prohibition Against Such Injunctions in Part Rests on the Fundamental Constitutional Independence of the States and Their Courts, the Exceptions Should Not Be Enlarged by Loose Statutory Construction. Proceedings in the State Courts Should Normally Be Allowed to Continue Unimpaired by Intervention of the Lower Federal Courts, With Relief From Error, if Any, Through the State Appellate Courts and Ultimately This Court.

A three judge court in the Fifth Circuit has interpreted the **Atlantic Coastline** 1970 holding (398 U.S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234) as it would seem to apply to the instant case. **Mitchum v. Foster**, 315 F. Supp. 1387 (1970), USDC, N.D. Fla. (Three Judge Court). In that case, a "Robert Mitchum" was the respondent in an Abatement of a Nuisance action in the Florida State Court. The three judge court held that 28 U.S.C. 2283 applied to the state court abatement of a nuisance equity proceeding based on the sale of obscene materials, with facts identical to the instant case, stating:

> "The injunctive relief sought here as to the proceedings pending in the Florida courts does not come under any of the exceptions set forth in Section 2283. It is not expressly authorized by Act of Congress, it is not necessary in the aid of this Court's jurisdiction and it is not sought in order to protect or effectuate any judgment of this court.
>
> * * * * * * *
>
> ". . . No amount of tortured reasoning by us will suffice to force the factual situation in this case as out-

lined above into fitting any of the statutory exceptions to the anti-injunction mandates of Title 28, U.S.C., Section 2283. Injunctive relief, either preliminary or permanent, is not available on these facts." Mitchum v. Foster, 315 F. Supp. 1387 (1970).

Certain it must be that 28 U.S.C. 2283 would be sufficient grounds by itself to justify the denial of injunctive relief by the District Court in the pending instant state court abatement of a nuisance action, if **Mitchum v. Foster**, *supra*, is a correct interpretation of Atlantic Coast Line.

IV (I)

Construction by the U. S. Supreme Court and State Supreme Courts Determine the Construction to Be Placed on Obscenity Ordinances.

If the issue of the facial constitutionality of the Mobile Obscenity Ordinance is reached, the following seems relevant. Petitioners' brief, page A. 6, sets out the amendment to the Mobile Obscenity Ordinance, section 1 of which is as follows:

> "Section 1. (a) A thing is 'obscene' if, by contemporary community standards, and considered as a whole, its predominant appeal is to prurient interest. As a matter of state and City of Mobile public policy, obscenity is utterly without redeeming social importance and constitutes a public nuisance which should be abated."

Suffice it to say, concerning the "presumption" question discoursed at great length in the brief of petitioners under proposition (I), for printed material to BE obscene, the U. S. Supreme Court has dictated that such material must be "utterly without redeeming social value"

Memoirs v. Mass., 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed. 2d 1 (1966). Therefore, before any court may determine that material is obscene, by virtue of the supremacy doctrine, such court must find that the material is utterly without redeeming social value.

Therefore, material which **is** obscene in law, must have been found utterly without redeeming social value, and so subject to stricture, as in the Mobile Obscenity Ordinance 36-022, as amended by Ordinance 41-183 (Appx. p. 78).

Parenthetically, the definition of "obscene" in the first sentence of Ordinance 41-183 must, under the supremacy doctrine, have read into it the "utterly without redeeming social value" element. See **Entertainment Ventures, Inc. v. Brewer**, 306 F. Supp. 801 (M.D. Ala.) (Three Judge Court), 1969; **The Great Speckled Bird v. Stynchcombe**, 289 F. Supp. 1291 (N.D. Ga. 1969). **Delta Book Dist., Inc. v. Cronvich**, 304 F. Supp. 66 (E.D. La. 1969).

SUMMARY

The actions of the Respondents complained of by the petitioners arose under separate courses of action followed by petitioners. Primarily, petitioners entered into a scheme or design to acquire licenses for vending machines without identifying the entity or person who would be responsible. Since Petitioner's scheme resulted in them not being able to identify the non-licensable entity proposed as licensee, they sought to evade the statute requiring cities to know who is being licensed, by simply operating the machines without obtaining or paying for licenses. This course of action brought on a suit for the money owed for operating the machines and attachment of the machines for this money due; an arrest for operating machines without a license; and, revocation of peti-

tioner's bookstore license for operating the vending machines without licenses. Petitioners seek to evade all these consequential actions by claiming the right to evade Sec. 751, due to its unconstitutionality, in requiring the identity of a non-entity.

If petitioners could have proved Cine-Matics, Inc. existed to be licensed when licenses were sought, petitioners would most certainly have done so. Similarly, as to the claim in the sworn complaint, and then in brief (Appx. pp. 15-16, Pet. brief pp. 4-5) that the City was furnished the information it required, as to proposed licensees, petitioners would most certainly have offered proof, if it were possible. There is no such proof in the record, and that is the most significant **fact** of the record.

On equitable principles, alone, these petitioners should be granted no relief in this Honorable Court. **Younger v. Harris**, *supra*; **Samuels v. Mackell**, *supra*.

As to the consequences following a deceit, a claim of unconstitutionality will not be heard to excuse the consequences of a voluntary, deliberate and calculated course of fraud and deceit by one who elects such a course as a means of self help, and attempts to escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional where such evaded statute is not the statute from the consequences of which he seeks to be relieved. **Bryson v. United States**, 396 U.S. 64.

As further and additional grounds for the correctness of denying relief in Federal court for these petitioners, great and immediate irreparable injury is necessary before injunctive or declaratory relief should be considered. On Pages 21-22 of this brief are itemized numerous considerations showing the petitioners did not actually consider any great and immediate irreparable injury to have taken

place; most significant being the reopening for business after filing this action. The only "ultimate censorship" seemed to be petitioner's own.

On Page 21 of the brief is the start of a list of alternatives petitioners could have resorted to, one or more of which would have been a plain, speedy and efficient remedy in the State court to contest the state (city) taxing procedure. Therefore, on the basis of **Samuels v. Mackell**, *supra*; **Great Lakes Co. v. Huffman**, 319 U.S. 293 (1943), and 28 USC 1341, the Tax Injunction section, these petitioners are due no relief from the consequential actions of the City.

Finally, aside from questioning the licensing procedures and consequences in a manner as called for by the cited authorities, i.e., resorting to state court, the actual state court proceedings here involved are subject to 28 USC 2283, which would seem to specifically exclude injunctive relief under these facts; **Atlantic Coast Line v. Brotherhood**, 398 U.S. 281 (1970); **Mitchum v. Foster**, 315 F. Supp. 1387 (1970), as well as the rational and holdings of **Younger v. Harris**; **Samuels v. Mackell**; **Perez v. Ledesma**, et al., 39 LW 4201 et seq.

Respectfully submitted

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APPENDIX A

United District Court for the Southern District of Alabama

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Number and Title Omitted. Filed Oct. 16, 1970)

Introduction

The evidence upon hearing for preliminary injunction in this cause showed the following to be the facts concerning the business and those responsible for the business at 12 South Conception Street, Mobile, Alabama, during the months of October and November, 1969, and from April, 1970 to the date of the hearing, May 22, 1970.

In early October, 1969, a bookstore was owned, opened and licensed by Robert Mitchum, apparently a non-resident of Alabama, and not a party to this action as filed or at the time of the hearing. Vending machines were moved into the store and applications were made for a license for the vending machines by various interests from out of the state of Alabama, the interests refusing to reveal their identity when making such applications. Licenses, alleged in the complaint to have been applied for by Cine-Matics, Inc., a body corporate of the State of Alabama, could not have been issued lawfully as there was no such corporation, nor was there any of the same name qualified to do business in Alabama to whom licenses could have been issued. The vending machines were put into operation without licenses having been obtained, by any agent of the out-of-state interests, which after a hearing, resulted in the license for the bookstore of Robert Mitchum being revoked by the City of Mobile.

During the November operating time purchases were made by the City of the materials in the store of Robert Mitchum which subsequently led to a single arrest of one of Robert Mitchum's employees on a charge of selling obscene material and to an injunction suit for operating a business of selling obscene materials. The latter action was against the actual owner of the store, who is Robert Mitchum (not a party to this action as filed or at the time of the hearing).

From these facts, essentially, this litigation arose. It was brought in the name of the one employee of Robert Mitchum, who was arrested, Claude Ballew, and in the name of a corporation which did not exist at the time of any of the occurrences alleged in the complaint concerning the corporation; nor was there a corporation, of the same name as petitioner, doing business in Alabama which could effectively, and lawfully, transfer any rights to a subsequent corporation styled as is the corporate petitioner in this action.

Ballew seeks relief from the one charge of selling obscene material and the one arrest for operating vending machines without a license therefor. The latter charge is alleged, by the complainants under oath, to have arisen due to the City wrongfully having refused to issue licenses (to a non-existent corporate owner). Cine-Matics, Inc., which did not exist and which offered no proof of the manner in which it could have acquired in law the rights claimed to belong to it as alleged in the complaint, seeks relief from the actions taken by the City which were based upon the vending machines being admittedly operated without licenses.

By reason of facts found, and the legal conclusions reached, all as hereinafter set forth, I am of the opinion that a decree should be entered denying the preliminary injunctive relief sought by petitioners and finding that the

City ordinances and licensing procedures, and state laws attacked as unconstitutional or unconstitutionally applied are neither. In connection with the foregoing, I enter the following findings of fact and arrive at the following conclusions of law:

1

On October 8, 1969, a bookstore at 12 South Conception Street, Mobile, Alabama, was opened by, stocked by, licensed with business license to and supplied with employees by Robert Mitchum, reputedly of Atlanta, Georgia. The City of Mobile issued a license to Robert Mitchum as the owner of the store. Paragraphs (2) through (6), below, set out involvements concerning licenses for vending machines and the bookstore which the evidence shows in no manner, ultimately, involved the issue of obscenity.

2

During October, 1969, an application for licenses for vending machines was made to the Revenue Department of the City of Mobile and referred to the Police Department, the licenses to be for "Robert Mitchum", of Atlanta, Georgia. The undisputed testimony is that the agents of Robert Mitchum refused to give information sufficient to allow an investigation into the identity and possible criminal record of the purported owner at that time, Robert Mitchum. During this time, the City was without knowledge of the true nature of the vending machines, and consequently did not issue licenses for what could have been gambling machines or some game of chance, as far as is shown by any evidence before me at this time. The bookstore operated during the month of October with no further inter-action of the City or the owner-licensee, Robert Mitchum.

3

During the first week of November, 1969, Robert Mitchum, the store owner and licensee, had, or allowed, vending machines moved into the bookstore purportedly to show movies. The Legal Department of the City of Mobile was advised at this time by the Police Department of the refusal of Robert Mitchum as the owner of the store, and as the intended licensee for the vending machines, to divulge information sufficient to allow an investigation of his background and possible criminal record. Shortly thereafter the Revenue Department of the City of Mobile received a letter from Joe Fine, Attorney of Russellville, Alabama, for "Cine-Matics, Inc.", to which letter was attached a check offered in payment of licenses for the vending machines "owned" by "Cine-Matics, Inc.".

"Cine-Matics, Inc.", an Alabama body corporate, petitioner here, was not in existence during or prior to November, 1969. However, the City was not aware that such was the case, nor was the City aware that no corporation, "Cine-Matics, Inc.", or any of very similar name, whether an Alabama or foreign corporation, was qualified to do business in Alabama during or prior to November, 1969.

4

On or about November 10, 1969, the Legal Department was visited by Attorney Fine, who was in Mobile seeking to have licenses issued for the vending machines which purportedly showed movies, in the name of a corporation styled "Cine-Matics, Inc.". The City Attorney, William H. Brigham, advised that the City must know who was to be held responsible for the operation of vending machines for which licenses were sought, and therefore investigation forms would be forwarded to Attorney Fine with an accompanying letter explaining the information desired by

the City. The forms were sent, with letter, on November 13, 1969. There is no doubt that the forms were never returned, the true owner, whomever he or it may be, thereby refusing to divulge the information reasonably necessary for the welfare of the citizens of the City, State and the "other 49 states."

On approximately November 14, 1969, the true owner of the vending machines having refused to divulge information concerning any corporation qualified to do business in Alabama or a suitable individual to whom licenses could be issued for the vending machines, commenced operating the vending machines without licenses. It is here noted that the complaint admits that petitioner Ballew operated the vending machines, on advice of counsel, without licenses for the vending machines. The proof is undisputed that there was no corporation to whom licenses could have lawfully been issued as none was qualified to do business with a name as alleged for the corporate petitioner. The same "counsel" who advised Ballew to operate the vending machines without licenses was aware of this state of facts.

5

On November 18, 1969, the City of Mobile License Code was amended to make definite the amount required for vending machines which showed movies, an annual rate being established therefor. The proof at the hearing showed that the annual license rate was considerably below some rates presently being collected by the City according to the undisputed evidence.

Also on November 18, 1969, an employee of the store, Claude Ballew, as agent of the owner of the vending machines who would not divulge sufficient information to allow determination of a police record, or as agent of a corporation (which, unknown to the City, was not qualified to do business in Alabama), was served notice that

the licenses for the vending machines should be paid by whomever was responsible for the vending machines being operated without licenses in the bookstore licensed to Robert Mitchum.

On November 20, 1969, the License Department Investigator, Seale, determined that the vending machines were still being operated without licenses and therefore obtained a warrant for the arrest of Claude Ballew, as the agent of the owner of the bookstore and the owner of the vending machines who allowed the machines to be operated without a license. Claude Ballew was arrested on this charge.

On November 20, 1969, a civil suit was filed against Cine-Matics, Inc., as the owner, or whatever entity was the owner, of the vending machines being operated without licenses, for the money owed on the licenses. As the owner was unknown and apparently a non-resident of the State of Alabama, the only property in Alabama known to be owned by the true owner, the vending machines, was attached to satisfy whatever judgment might be forthcoming under this civil action for money owed. The owner of the vending machines has, as far as any evidence presented shows, refused to demand the return of the machines, and has also **voluntarily** chosen not to obtain possession by following procedures allowed by law in attachment suits. Title 7, Section 876, Code of Alabama.

6

On November 25, 1969, at the next City Board of Commissioner's meeting, the bookstore license was conditionally revoked due to the owner of the bookstore, Robert Mitchum, operating or allowing the operation of unlicensed vending machines in his store, after notice, and contrary to the law of the State of Alabama, as well as the City of Mobile. Title 37, Section 754, Code of Ala-

bama. Notice of a hearing to show cause why the conditional revocation should not be made final was served on the agent of the licensee of the store and on the attorneys for the same, the hearing to be held two weeks subsequent to the conditional revocation.

On December 9, 1969, the hearing on the show cause procedure under the license code of the City of Mobile was held at the regular meeting of the Board of Commissioners. Robert Mitchum was represented by counsel John Coleman of the Mobile bar. The only testimony given at the hearing by any party, which was uncontradicted and which was not denied, was that after notice of license being required and due, the vending machines were operated at the bookstore of Robert Mitchum and were not licensed at the time.

At the time of this "show cause" hearing there had been no conviction on the basis of a violation of the City of Mobile's obscenity ordinance. Apparently as a consequence of this situation, there was no testimony, whatsoever, given at the license revocation hearing concerning any violation of the obscenity ordinance upon which a license revocation could be founded.

Consequently, on the basis, and only on the basis that the bookstore was operated in contravention of the laws of the State of Alabama and the City of Mobile by operating vending machines without licenses, the revocation of the bookstore license of Robert Mitchum was made final by the Board of Commissioners on December 9, 1969.

On May 18, 1970, a civil action in State Court for money owed by Robert Mitchum or the true owner if other than Robert Mitchum, as actual owner of the vending machines for which license fees were due, was filed. This action was filed after the City became fully aware that there was no corporation qualified to do business in Alabama, domestic or foreign, with a styling similar to "Cine-Matics, Inc.",

at the time when the vending machines had been operated previously, and at the time when the previous civil action brought against "Cine-Matics, Inc.", had been filed. Attachment in aid of suit against Robert Mitchum was made on the materials in the store, since this was the only property known as supposed to be owned by non-resident Robert Mitchum. This was done in order that the judgment against this non-resident might be satisfied, if and when obtained. There was no proof that Robert Mitchum thereafter sought the return to his possession of these materials by the process of law provided him, or the true owner if other than him. Title 7, Section 876, Code of Alabama.

7

The facts concerning the operation of Robert Mitchum's store in violation of the obscenity ordinance of the City of Mobile as shown at the hearing for preliminary injunction were as follows:

On November 17, 1969, representatives of the City of Mobile bought samples of the various merchandise sold in the store of Robert Mitchum including newspapers, magazines, books and movie film. On November 20, 1969, officers of the Mobile Police Department bought one book from employee Claude Ballew, which book was taken by the officers to the Judge of the City Municipal Court. The Judge examined the book completely and then signed a warrant for the arrest of Claude Ballew for selling the book in violation of the obscenity ordinance of the City of Mobile.

On November 20, 1969, suit was filed by the City seeking an injunction against the operation of the bookstore of Robert Mitchum in violation of the obscenity ordinance of the City of Mobile, the defendants in the injunction suit being served and notice given to the Attorneys for the defendants, John Coleman and Robert Smith. On November

21, 1969 a motion for instanter relief in the injunction action was filed by the City of Mobile and on the basis of affidavits submitted to the Court by citizens of the City of Mobile including the President of Downtown Mobile Unlimited and the Executive Secretary of Downtown Mobile Unlimited, the injunction was issued on this date. The defendants totally failed to appear, file an answer, or request for hearing or any other pleading at any time whatsoever in this case. Consequently a decree pro confesso was entered more than five months later by the State Court (Judge McRae).

On December 12, 1969, Claude Ballew, the employee of Robert Mitchum at the bookstore, was convicted in the Mobile Municipal Court on a single charge of selling a book in violation of the obscenity ordinance, and one charge of operating vending machines without licenses therefor. These cases were appealed to the Circuit Court of Mobile County, State of Alabama, by defendant and are pending therein.

As against the complaint allegations that petitioners are being crushed by delayed vindication of their First Amendment rights, it has not been disputed that plaintiffs have acquiesced for months and months in the postponement of the pending state criminal proceedings. They have neglected during all this time to press for their right to speedy state adjudications or even to press to raise in the state courts the issues of constitutional law they want this court to decide.

Conclusions of Law

8

It was conclusively proven that the Alabama corporation named as one of the petitioners in this proceeding did not even exist at the time the matters alleged in the complaint

were alleged to have in fact occurred to, and been the concern of, this "corporate" petitioner and from which it allegedly suffered multitudinous constitutional oppressions. Therefore, the Alabama corporation has no standing to complain of the matters alleged. There was no proof of the existence of a foreign corporation by the name of Cine-Matics, Inc. But even if there were such a foreign corporation, such foreign corporation was not entitled to do business in State of Alabama of the nature alleged in the complaint as it was conclusively proven that no such foreign corporation had ever qualified to do business in Alabama. Therefore, no foreign corporation, if it exists, could have been lawfully issued licenses by the City of Mobile. Any business done by a foreign corporation in Mobile of the nature alleged in the complaint was illegal and violated state law. **Code of Alabama,** Title 10, Section 21(89) et seq; **Constitution of Alabama,** Article 12, Section 232. Any business done by agents or employees of Cine-Matics, Inc., was a violation of State law. Therefore, the corporate petitioner cannot be the real party in interest, if there is such, entitled to relief of some nature in this action, for all the wrongs allegedly done to this corporate petitioner. (See Paragraph 20, infra.)

Robert Mitchum was not a party to this action when filed or upon hearing. He is, apparently, the real party in interest so far as the business and license of "Mobile Book Mart" are concerned. Claude Ballew is not the real party in interest as to these matters, he being merely an employee of Robert Mitchum. Rule 17 (a) of the Federal Rules of Civil Procedure provides that "every action shall be prosecuted in the name of the real party in interest . . .".

Robert Mitchum, on hearing was shown to be the prime instigator of the complaint in this case. The complaint claims wrongs to a non-existent corporation and wrongs to the license and business interests alleged in the complaint

to belong to one shown by the evidence to be a mere employee. Mitchum, by counsel, after the evidence showed his design, sought to amend under Rule 17 (a) and become a party thereunder as the real party in interest. Transcript p. 89. This Court granted the motion to amend in five days, as sought by Mitchum. Mitchum, following his pattern, filed an amendment weeks later based on Rule 19. He alleged that this Court had allowed him to do so.

It is difficult to find that Robert Mitchum comes into this Court with clean hands.

9

Claude Ballew is a real party in interest and does have standing to complain concerning the two arrests made against him. However, these matters are now pending on appeal for trial in the State Court and would appear to be classic examples of those state actions which are prohibited from being enjoined because of the provisions of United States Code, Title 28, Section 2283; vix, the facts of these cases are not within an exception of this injunction statute.

As pointed out above, Cine-Matics, Inc., had no licenses for the operation of the vending machines alleged in the complaint to belong to the corporation, and could not have validly acquired or held licenses. Any act done by Ballew in furtherance of the illegal activities of Cine-Matics, Inc., i. e. operating the vending machines allegedly owned by "Cine-Matics, Inc., an Alabama body corporate" was also illegal. No other person or entity bought the licenses. The arrest for operating the machines without licenses must stand.

10

Assuming, without so deciding, that an injunction might possibly lie under proper facts, the arrest for sale of obscene materials is still of a nature to disallow injunctive

relief. Petitioners would have the court hold that no **arrest** may be made without a prior judicial adversary hearing on the issue of obscenity. This is contrary to the law. While there is a great deal of authority to the effect that there must be a prior adversary hearing on obscenity *vel non* before **seizure** there is no U. S. Supreme Court or Fifth Circuit Court of Appeals authority requiring such a hearing before arrest based upon a purchase of the material and examination of the same by a Judge who, on the basis of the examination, signs the warrant (See **Entertainment Ventures v. Brewer**, 306 F. Supp. 802, and **Thevis v. Moore**, decided in the U. S. District Court for the Northern District of Alabama, Southern Division, April 22, 1970).

The U. S. Supreme Court has recently affirmed cases with arrests made as in this case, i. e., after a judicial officer had scrutinized the materials. Milky Way Productions, Inc. v. Leary; New York Feed Co., Inc. v. Leary; 305 F. Supp. 288 (3 Judge Court); Affirmed February 27, 1970, 90 S. Ct. 817.

". . . A point of greater importance, both as a matter of legal history and practical judgment, is the fact that the prior adversary proceeding plaintiffs demand would not serve to eliminate either the 'chill' or the 'prior restraint' against which they contend. It does not appear that there were any arrests in the present cases before a judicial officer had scrutinized the materials and determined that warrants should issue. All that, like the proceedings of a grand jury, was accomplished ex parte—without either the possible benefit to the accused or the potentially 'chilling' effect upon others of adversary proceedings. The result, at least in terms of history, is to avoid any traditional form of 'prior restraint' because the first overt impact upon the allegedly protected area comes at a time when all the protections and favorable

presumptions of the criminal process are available to the defendant, Cf. Near v. Minnesota, 283 U.S. 697, 713-714, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

* * * * * * *

At any rate, we find no warrant in the First Amendment or the cases that give it full meaning for compelling the radical change plaintiffs seek in state (and, presumably, federal) criminal procedures affecting obscenity cases." Milky Way v. Leary, *supra.*

11

The acts of the City based on its obscenity ordinance followed, in time, the decision of **Entertainment Ventures v. Brewer**, 300 F. Supp. 802. It is evident to me that the amendment of the City obscenity ordinance, and the method of its application by the City, follow the dictates of **Entertainment Ventures.**

None of the alleged grounds of unconstitutionality of the amended obscenity ordinance are applicable in view of the constructions arrived at in **Entertainment Ventures.** Specifically, I find as in that case that the term "utterly without redeeming social value" is construed into the first sentence of the definition of obscenity found in the amended obscenity ordinance of the City. In fact, there can be no doubt that the City understands that such must be the case, as the ordinance states that (as a thing to be "obscene" must be utterly without redeeming social value), such "obscenity" obviously is utterly without redeeming social value and is therefore a public nuisance.

Furthermore, the evidence is conclusive that no action under the obscenity ordinance, i.e. neither the arrest of Ballew for selling a book nor the seeking of injunctive relief in the state Court against operating a business

of selling obscene material, was undertaken on the basis of seized or confiscated materials. All materials were purchased which were involved in these actions by the City and physically submitted to the state court for thorough examination in both cases, before the State court signed the warrant in the arrest case, and before the Court issued the temporary restraining order in the injunctive abatement of a nuisance case. In connection with the use of the purchased materials, I find that, as a matter of law in Alabama, exhibits such as are incorporated into the abatement of a nuisance bill of complaint became an integral part of the complaint itself, as though set out in full therein, including the title and publisher or manufacturer.

12

Therefore, there was no showing that the arrests of petitioner Ballew were done under an unconstitutional state, in an unconstitutional manner. This leaves no basis for enjoining the state court prosecutions of petitioner Ballew.

For these petitioners to satisfy the burden of proof for the right of preliminary injunctive relief, petitioners must show that the injunction is needed to prevent irreparable injury which would otherwise be suffered pendente lite. **Douglas v. City of Jeanette**, 319 U.S. 157, 163-164, 63 S.Ct. 877, 87 L.Ed 1324 (1943); **Clark v. Thompson**, 206 F. Supp. 539, 313 F. 2d 637 (1963).

> "The burden is not met by plaintiffs such as these who have had an available state forum for their claims over a period of three or four months, have been entitled to speedy adjudications in that forum, Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and have chosen simply to

> bypass that avenue of relief in favor of seeking federal intervention. If such delay and disregard of state processes pending the arrival of self-inflicted 'emergencies' could meet the test for a federal injunction, the abrasive devise would promptly lose its 'exceptional' character and would become a commonplace irritant." Milky Way Productions v. Leary, 305 F. Supp. 288, 292, Aff. 90 S.Ct. 817 (1970).

Furthermore the interest to be protected must be personal to the petitioner, since the plaintiff must assert an adequate interest in himself, which the law recognizes even though the public may have an interest in the outcome. **Alabama Federation of Labor v. MacAdory**, 325 U.S. 450, 461, 65 S.Ct. 1384, 89 L. Ed. 1725 (1945); **Moores Federal Practice**, Vol. 6A, Paragraphs 57.11, 57.15, 57.18(2). As has been shown above, the petitioners before the court have failed to show that they have or will, sustain irreparable injury from any action of the City applicable to them. Further, it would appear that the probability of these petitioners success on the merits is doubtful. Furthermore, I find it necessary to consider the good faith of the parties, in light of the many allegations in the complaint claimed to be in the name of the petitioners, but which are contradicted by the evidence. **National Fire Insurance Company v. Thompson**, 281 U.S. 331, 338, 50 S.Ct. 288, 74 L.Ed 881 (1930), where it is stated: "Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect to the matter concerning which it seeks relief," **Franke v. Wiltschek** (CA 2), 209 F.2d 493, (1953).

13

The foregoing findings of fact and conclusions of law are determinative of the only possible grounds of relief applicable to the petitioners in this action at the time of

the hearing. All other claims set out at length in the pleadings apparently apply to Robert Mitchum, as the business owner and licensee, as well as the apparent true owner of the vending machines while causing or allowing the operation thereof in his store.

In order that the numerous issues raised, purportedly concerning the rights of the petitioners, can be viewed in proper prospective, and to clarify the law which actually is determinative of said issues, I make the further conclusions of law, based on the above findings of fact.

14

The evidence shown by the finding of facts leads me to the conclusions that any claim for injunctive relief to prevent the city from seeking its lawfully enacted licensing fees is prohibited by 28 U.S.C. 1341, when considered in conjunction with the available applicable Alabama remedies and relief. The Federal statute is:

> "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law, where a plain, speedy, and efficient remedy may be had in the courts of such state."

15

The applicable Alabama law affording "a plain, speedy and efficient remedy" is found in Title 7, Section 156, et seq., **Code of Alabama.** In summary, the sections of the declaratory relief statute allow immediate injunctive relief from any variety of oppression under confiscatory licensing procedures attempted by municipalities in Alabama. All that is required is that the real party of interest file the action, and be able to prove the basis for relief. **Dunbar-Stanley v. City of Mobile,** 282 Ala. 386, 211 So. 2d 803, cert. den. 394 U.S. 212, 89 S.Ct. 1007, 22 L.Ed.

2d 209; **Bessemer v. Bessemer Theaters**, 252 Ala. 117, 39 So. 2d 658 (1949).

Months passed after the alleged wrongs to petitioners, with no resort to state court procedures, before this federal action was filed. **Milky Way Productions v. Leary**, 305 Supp. 288, 292, Aff. 90 S.Ct. 817 (1970).

16

Furthermore, the City was following the law of Alabama in adopting the amendment to the license code, designated Paragraph 414(h) in relation to vending machines which show movies. See **Bessemer Theaters v. Bessemer**, 261 Ala. 632, 75 So. 2d 651 (1954), and the authorities therein cited, on necessary and permissible legislative discretion of municipalities adopting revenue measures under licensing procedures. Therefore, I find that paragraph 414(h) was not an unconstitutional license fee that need not be complied with by petitioners, or specifically the store owner and vending machine owner.

17

Much is made in the pleadings of the license revocation procedures of the City. This court takes judicial notice of the ordinances of the City of Mobile. **Monk v. City of Birmingham**, 87 Fed. Supp. 538, D. C., N. D. Ala. S.D. (1949); Title 7, Section 429(1), Code of Alabama, 1940 as amended. Upon examination of Section 30 of the License Code of the City, I find that the procedural safeguards of due process are available to licensees upon conditional, and hearing for final, revocation of City licenses. See copy of Section 30 attached hereto. Certainly no proof was offered to show that the exact procedure outlined by the License Code was not followed. In fact, I find to the contrary, and find the store owner and licensee had every opportunity to present evidence that the statutes of the state and city

with regard to operating vending machines without licenses had not been breached, but presented no such evidence. In this regard, see **Dean's Dry Cleaning v. City of Chicago** (CA 7), 123 Fed. 2d 104-105 (1941).

> "A federal court will rarely interfere through temporary (or permanent) injunction, with the conduct of municipal government by the city's administrative officers. This general rule finds its strictest application in cases where the order sought would regulate the granting of licenses to carry on a business in the city, and which business is of a public nature".

18

There is no doubt that the petitioners herein at the time of the hearing had no proprietory interest in the store during the operation in 1969 or 1970. But the unrefuted evidence shows that rather than the store owner stopping the operation of the store due to fear of being in contempt of the state court instanter injunctive order in the abatement of a nuisance action, as alleged in the complaint, the store owner apparently held the decree of the state court in contempt, as shown by his complete refusal to file any denial, answer or pleading in the action whatsoever. More particularly, the store owner refused to seek the immediate hearing which was his legal right in the proceeding. "Motions to dissolve injunctions . . . may be submitted during the call for motions on one day's notice . . .", Title 7, Equity Rule 93, **Code of Alabama,** as amended.

Actually, the out-of-state store owner re-opened his store in complete **defiance** of the state court order in April, 1970. Any claims for relief from threats or suppressions due to the writ of the abatement of a nuisance action were held to be baseless, if not a complete sham.

I further find that there was no "censorship" or "prior restraint" or "suppression" due to the actions of the City in the civil suits filed to obtain the money due for licenses on the vending machines. The evidence is undisputed that the vending machines were used, and license mony was due from someone under the Alabama law. Title 37, Section 751, 754, **Code of Alabama**, as amended, as well as the City License Ordinance. The petitioner, Cine-Matics, Inc., a body corporate of the State of Alabama, claims to have owned the vending machines at the time of the use of the machines at 12 South Conception Street, Mobile, a specious claim under the evidence. But the same specious sham was held out to the City in November of 1969 by agents of the unknown true owner. Therefore the suit brought by the City against Cine-Matics, Inc., for money owed in November, 1969, was in good faith reliance by the City on the petitioner's fraudulent representations of ownership at that time. Since petitioner Cine-Matics, Inc. would not furnish the names of any corporate officers or information which could show an organization to meet financial responsibilities to the City and State, the only known connection of Cine-Matics, Inc. to the State of Alabama was attached, under bond, to satisfy money owed by the petitioner (though in actuality owed by the true owner of the vending machines).

When the store of Mitchum re-opened without license and by continuing to ignore the State Court injunction action, the store materials of Robert Mitchum were also attached for the money still owed for vending machine licenses. This attachment was done after the petitioners filed the Federal Court action attempting to have this court believe there was a lawful manner in which petitioner Cine-Matics, Inc., owned the vending machines during November, 1969. Since the evidence shows this could

not be the case, the owner of the store can reasonably be seen as the owner of the machines when they were in use in November, 1969, in Alabama. But the evidence shows he is admitted to be a non-resident, allowing attachment of his only known assets in Alabama in aid of suit for money owed.

Robert Mitchum, as owner of the bookstore materials and vending machines attached could have, and can now follow the known law of Alabama, Title 7, Section 876, **Code of Alabama,** and thereby obtain possession of the bookstore materials and vending machines at any time. This was the case on the very days on which the vending machines and the store materials were attached. Therefore, there is no "suppression," "prior restraint," or "censorship" of First or any other amendment rights, by the actions of the City in the civil actions for money due.

20

I further find that the procedures of the City in inquiring into the nature of the vending machines to be installed within the City, as well as inquiring into the person, firm or entity who purportedly is to be the licenses of such machines, are reasonable and do not violate any constitutional mandate. States must be allowed to regulate the doing of business by corporations within the State's boundaries, e.g. for protection of the property rights of the citizens, and to ensure that corporations will be amenable to suit in Alabama Courts. Such is the purpose of the registration of corporation statutes, as well as the state Constitutional provision of Article 12, Section 232, Constitution of the State of Alabama, **Code of Alabama,** as amended. "They constitute a police regulation for the protection of the property interests of the citizens of the state . . . The doing of a single act of business, if it be in the exercise of a corporate function, is prohibited. The policy of the Constitution and statute is to protect our citi-

zens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process from our courts in favor of citizens having cause of complaint." **Alabama Western R. Co. v. Talley-Bates Const. Co.**, 162 Ala. 396, 402-403, 50 So. 341, 342. See **Armour Packing Co. of La., Ltd. v. Vinegar Bend Lumber Co.**, 149 Ala. 205, 42 So. 866; **George M. Muller Mfg. Co. v. First National Bank of Dothan**, 176 Ala. 229, 57 So. 762. The City governing body was the further obligation to prevent, before its inception, business by persons or entities known to have tendencies to criminal activities, such as operating gambling devices or games of chance by means of vending machines. The fraud attempted to be perpetrated on the State of Alabama and City of Mobile during November of 1969, and conclusively shown by the evidence in this case concerning the petitioner Cine-Matics, Inc., shows the complete reasonability of such necessary City investigations, and therefore the constitutionality thereof.

> "A federal court will rarely interfere through temporary (or permanent) injunction, with the conduct of municipal government by the City's administrative officers. This general rule finds its strictest application in cases where the order sought would regulate the granting of licenses to carry on a business in the City, and which business is of a public nature." **Dean's Dry Cleaning v. City of Chicago** (CA 7), 123 Fed. 2d 104-105 (1941).

All other injunctive relief sought by the plaintiff will be denied.

10/16/70.

/s/ DANIEL H. THOMAS
District Judge

APPENDIX B

381a. Television Broadcasting Stations $200.00
Provided, however, this license shall not apply to that portion of the business that may be in Interstate or Foreign Commerce or to business done with the Government of the United States. (1-1-64)

399.5 Travel Agencies, shall pay a license of $30.00 on the first $6,000.00 or less of gross commissions for the year next preceding plus an amount equal to ½ of one per cent on all such gross commissions in excess of $6,000.00.

a. Travel Agencies, dealing in the sale of transportation only ..... $ 30.00
(4-27-65)

413. Vehicles Motor, carrying goods or merchandise and/or dirt, clay, sand, soil or other building material for hire or reward:

(a) where rated capacity is less than two tons ..... $ 10.00

(b) where rated capacity is two tons or more and less than three tons ..... $ 30.00

(c) where rated capacity is three tons or more and less than four tons ..... $ 40.00

(d) where rated capacity is four tons or more ..... $ 50.00
(1-1-65)

Section 29. Any license issued hereunder may, in the discretion of the Board of Commissioners of the City of Mobile, be revoked or suspended, for a term not exceeding the term of such license, when said Board shall be

satisfied that such licensee is doing business in violation of any penal law of the State of Alabama or of the City of Mobile. (12-13-61)

Section 30. Procedure for Revocation or Suspension of License. If said Board shall determine that the license issued hereunder shall be revoked or suspended on any ground set out in Section 29 hereof, said Board shall adopt a resolution to that effect, and as a part of said resolution shall conditionally revoke or suspend said license, as the case may be. The Clerk of the City of Mobile shall thereupon give written notice to the licensee of the action of the Board of Commissioners and shall attach a copy of such resolution to such notice. Said notice shall advise the licensee that the revocation or suspension shall become final at the second regular meeting of the Board of Commissioners following the passage of the resolution conditionally revoking or suspending such license, unless the licensee shall appear before the Board of Commissioners at such time and place stated in said notice and then and there show cause why such license should not be revoked or suspended, as the case may be. Said notice shall give the date, time and place of the hearing before the Board of Commissioners, and the licensee shall be given the opportunity at such time and place to be heard, and may appear and may have the benefit of counsel. If the licensee fails to appear either in person or through his attorney, the revocation or suspension shall be made final by the Board of Commissioners, and if such licensee should appear by himself or through his counsel, or both, the Board of Commissioners shall proceed to hear evidence which may be presented for and against such revocation or suspension. Said Board may, in its discretion, either continue the hearing for good cause shown, or may enter an order making the revocation or suspension final, or may permit the licensee to retain his license so long as he does not violate any penal law of the

State of Alabama or of the City of Mobile. Whenever a license is revoked or suspended and the revocation or suspension is made final by the Board of Commissioners, written notice of such action shall be given by the Clerk of the City of Mobile to said licensee. All notices provided for in this section to be given by the Clerk shall be deemed sufficient when deposited in the United States Mail, postage prepaid, addressed to the licensee at the address on file in the Office of the City License Officer. (12-13-61)

Section 31. It shall be unlawful for any person, firm or corporation to do business within the City of Mobile or within its police jurisdiction without having obtained from the City License Officer a license under this Ordinance, and it shall be unlawful for any person, firm or corporation whose license has been revoked or suspended in accordance with Sections 29 and 30 hereof to do business within the City of Mobile or within its police jurisdiction so long as such revocation or suspension shall remain in effect. Each day any violation of the provisions of this section shall continue shall constitute a separate offense. (12-13-61)

Section 32. The continued or recurrent performance of any act or acts within the corporate limits of the City of Mobile or within its police jurisdiction for which a license issued by the City of Mobile may be revoked or suspended under the provisions of this Ordinance is hereby declared to be detrimental to the health, safety, comfort and convenience of the public and is a nuisance. The City of Mobile, as an additional or alternative remedy, may institute injunctive proceedings in a court of competent jurisdiction to abate the same. (12-13-61)

Section 33. It is hereby declared to be the intention of the Board of Commissioners that the sections, paragraphs, sentences, clauses and phrases of this Ordinance are sev-

erable, and if any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Ordinance, since the same would have been enacted by the Board of Commissioners without the incorporation in this Ordinance of any such unconstitutional phrase, clause, sentence, paragraph or section. (12-13-61)

APPENDIX C

JUDGMENT AND ORDER

(Number and Title Omitted. Filed Oct. 16, 1970)

In conformity with a memorandum opinion filed contemporaneously herewith:

It is ordered, adjudged and decreed by the Court as follows:

1. The City of Mobile Ordinance No. 41-183 (Ordinance 36-022(2) as amended) is constitutional as written and petitioners' prayer to have the ordinance declared void is hereby denied.

2. The City of Mobile Ordinance No. 41-183 (Ordinance 36-022(2) as amended) has not been enforced in bad faith and petitioners' claim for relief from bad faith enforcement is denied.

3. Ordinance No. 41-183 (Ordinance 36-022(2) as amended) has not been applied to petitioners in an unconstitutional manner, and petitioners' claim for relief from an unconstitutional manner of enforcement is denied.

4. Section 1 of the City License Code, Item No. 414(h) and Section 30 of the License Code, are constitutional as written and petitioners' prayer to have the ordinances declared void is hereby denied.

5. Section 1 of the City License Code, Item No. 414(h) and Section 30 of the License Code, have not been enforced in bad faith and petitioners' claim for relief from bad faith enforcement is denied.

6. Section 1 of the City License Code, Item No. 414(h) and Section 30 of the License Code, have not been applied to petitioners in an unconstitutional manner, and petitioners' claim for relief from an unconstitutional manner of application is denied.

7. Code of Alabama, Title 37, Sections 505 and 506 are constitutional as written and petitioners' prayer to have the statutes declared void is hereby denied.

8. Code of Alabama, Title 37, Sections 505 and 506 have not been enforced in bad faith and petitioners' claim for relief from bad faith enforcement is denied, as applies to Case No. 75773 in the Circuit Court of Mobile County, Alabama, in Equity.

9. Code of Alabama, Title 37, Sections 505 and 506 have not been applied to petitioners in an unconstitutional manner, in Case No. 75773 in the Circuit Court of Mobile County, Alabama, and the petitioners' claim for relief is denied.

10. Petitioners claim for relief in all other aspects is denied.

Done this 16th day of October, 1970.

s/ DANIEL H. THOMAS
District Judge

APPENDIX D

NOTICE OF APPEAL

(Number and Title Omitted. Filed Nov. 13, 1970)

Notice is hereby given that Robert Mitchum as owner of the Mobile Book Mart, Claude D. Ballew and Cine-Matics, Inc., a body corporate of the State of Alabama, Plaintiffs herein, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order of the Honorable Daniel H. Thomas denying injunctive relief as sought in the Complaint entered in this action on the 16th day of October, 1970.

s/ JOHN COLEMAN
Attorney for Appellants Robert Mitchum,
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